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April 11, 1996

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VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: *Open Video Systems, CS Docket No. 96-46*

Dear Mr. Caton:

Enclosed for filing please find an original and five copies of the Reply Comments of Tele-TV in the above-captioned matter.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Yours sincerely,

Austin C. Schlick

Austin C. Schlick

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APR 11 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

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REPLY COMMENTS OF TELE-TV

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April 11, 1996

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SUMMARY

The purpose of this rulemaking is not to draw up blueprints for the future development of the open video system (OVS). That job should be left to companies that are investing in OVS. Nor should the Commission aim to address every hypothetical issue that might arise when OVS is actually deployed. Problems can be considered as they present themselves. The objective of this rulemaking should instead be to implement Congress's dictates and clear away those roadblocks to fair competition that exist today.

TELE-TV is one of the companies that is preparing to provide programming over open video systems, and it has encountered three specific problems that should be addressed at this early stage if OVS is to succeed in the marketplace. First, and most important, the broadcasters and cable programmers who control the video content that is TELE-TV's life-blood are refusing to provide it on terms comparable to those that they offer cable operators. Programmers are, for example, demanding that TELE-TV pay cash, new-entrant premiums for programming set aside usable capacity for channels the programmer may want to introduce in the future, and even refusing altogether to deal with TELE-TV.

Such strategies are straightforward violations of the Commission's program access rules when made by cable-affiliated programmers that use satellite delivery systems. But the seemingly limited applicability of the program access rules renders those rules inadequate to safeguard Congress's objectives for OVS. In this proceeding under the Telecommunications Act,

the Commission should not only extend its existing rules to OVS (as Congress specifically required), but also effectuate the goals of the new law by providing all multichannel distributors, including OVS programming providers such as TELE-TV, fair access to all video programming.

Second, the cable industry has urged in this proceeding that cable operators, who are the monopolists seeking to keep new competitors out of the market, should nevertheless be guaranteed space on open video systems even to the exclusion of new entrants. Accepting that position would put OVS programming providers' ability to secure enough capacity to compete with cable at the mercy of the cable monopolists themselves. Such a rule would be contrary to both the language of the Telecommunications Act and the public interest, and it should be rejected.

Third, some commenters have suggested that the non-discrimination obligations Congress placed on OVS operators might extend to programming providers who use open video systems, at least insofar as navigational devices, menus, and comparable information are concerned. Again, that suggestion is contrary to the Telecommunications Act, which imposes no such obligation on OVS programming providers. Moreover, any such rule would limit these providers' ability to compete with cable operators by offering differentiated navigation devices. The undesirable result would be reduced competition and innovation.

REPLY COMMENTS OF TELE-TV

TELE-TV is engaged in negotiations with broadcasters, cable-affiliated programmers, and other "independent" programming vendors in an effort to secure rights to deliver their programming to subscribers.[1] TELE-TV also has been working with equipment vendors to develop navigational software that will allow viewers to select programming quickly, easily, and intelligently, from the large array of offerings that will be available on digital video networks. TELE-TV, in short, is constructing its OVS offerings today.

In doing so, TELE-TV faces specific obstacles that threaten its ability to offer viewers an attractive alternative to cable. TELE-TV asks the Commission to address these problems by amending its programming access rules expressly to guarantee _all_ multichannel video distributors, including OVS programming providers,[2] access to _all_ programming on non-discriminatory terms; by making clear that OVS operators are not required to provide channel capacity to cable operators that have their own, competing delivery networks; and by clarifying that the

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[1]TELE-TV was formed by Bell Atlantic Corporation, NYNEX Corporation, and Pacific Telesis Group to, among other things, provide a branded programming offering over the three companies' video delivery systems.

[2]In these Reply Comments, we use the term "OVS programming providers" to refer to entities that will distribute programming to subscribers over open video systems. OVS programming providers include entities affiliated with the OVS operators who sell transmission capacity. OVS programming providers may obtain some or all of their video content from unaffiliated programmers.

Also in these Reply Comments, we refer to initial comments filed in this proceeding in short form (_e.g._, "NAB Comments").

Telecommunications Act does not prevent OVS programming providers from differentiating their programming packages by deploying innovative navigational devices, menus, and similar offerings.

I. THE COMMISSION SHOULD EXPRESSLY PROHIBIT DISCRIMINATION IN THE PROVISION OF ALL PROGRAMMING TO ALL PROGRAMMING PROVIDERS

Without access to the "core" programming that viewers demand from any multichannel service, OVS programming providers simply cannot attract viewers in head-to-head competition with cable. Programming providers, moreover, must be able to acquire this vital programming on fair terms. Using cable as an example, programming accounts (according to the Commission) for about one-third of multichannel video distributors' total operating costs. First Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7517 (1994) ("First Cable Competition Report"). If a new entrant must pay substantially more for identical programming than the cable incumbent, it will not be able to compete. And where such cost differences are not related to legitimate economic factors, the result is a stifling of much-needed competition.

By exacting "new-entrant premiums" from OVS programming providers, network broadcasters and other programmers put those providers at a substantial disadvantage as compared to incumbent cable operators. Indeed, the programmers may have a direct interest in imposing such an anticompetitive burden to benefit their own distribution operations. This problem is made even worse by cable operators' ability to exact special concessions from programmers. The gap between new entrants and incumbents is thus widened.

For all these reasons, programming providers such as TELE-TV are threatened with the possibility that they may be unable to secure vital programming on reasonable terms, which could be fatal to their future success.

A. The Commission's Program Access Rules Do Not Guarantee Video Programming Providers Access to All Essential Programming

The Commission has proposed simply to apply the restrictions of its program access and program carriage rules to OVS operators. Report and Order and Notice of Proposed Rulemaking, Implementation of Section 302 of the Telecommunications Act of 1996, CS Dkt. No. 96-46, at ¶¶ 61-62 (rel. Mar. 11, 1996) ("NPRM"). That would not remedy the discrimination faced by OVS programming providers. The Commission's current program access rules apply on their face to programming that is distributed via satellite, not programming that is delivered exclusively by broadcast stations or microwave systems. See 47 C.F.R. §§ 76.1000 et seq. Moreover, key provisions of the current rules, addressing discriminatory practices and exclusive arrangements, seemingly apply only to programmers that are affiliated with cable operators (or, now, with OVS operators). Id.; 1996 Act § 653(c)(1)(A) (extending section 628 to OVS operators). The rules thus have been interpreted to place no restriction on the ability of television broadcasters and other programmers that are not affiliated with cable operators to discriminate in granting or withholding carriage rights. See Applications of Capital Cities/ABC, Inc. and the Walt Disney Co., FCC No. 96-48, 1996 FCC LEXIS 96-48, at ¶ 24 (Feb. 8, 1996) (program access rules not applicable to Disney and Capital Cities/ABC).

The Commission's "program carriage rules" likewise afford very limited protection. These rules prohibit anticompetitive practices by cable operators in their dealings with unaffiliated video programmers, but they do not directly address discriminatory practices by programmers themselves. See 47 C.F.R. §§ 76.1300 et seq.

The limitations of these rules reflect the focus of the 1992 Cable Act, which required their promulgation. See 47 U.S.C. §§ 536, 548. Congress's primary concern was curbing the market power of cable operators and vertically integrated cable programmers (and, incidentally, the market power of satellite carriers over home satellite programming distributors). See S. Rep. No. 92, 102d Cong., 1st Sess. 24-29, 32-34 (1991) (discussing program access provisions and monopsony power of cable multiple system operators ("MSOs")); see also 1992 Cable Act § 2(a) (statement of findings). The Commission's focus in this proceeding, by contrast, should be carrying out Congress's intent to facilitate fair competition between OVS and cable. Extension of the Commission's program access rules to all programmers, regardless of their ownership or the means by which they distribute their programming, is critical to accomplish that end.[3]

B. Access to Broadcast and Cable Programming Is Essential to the Success of OVS

As the Commission has recognized, new entrants that seek to compete directly with cable will have to offer programming packages that are comparable to those now offered by cable systems. Second Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Dkt. No. 95-61, FCC No. 95-491, 1995 FCC LEXIS 7901, at ¶¶ 134-36 (rel. Dec. 11, 1995) ("Second Cable Competition Report"). This requires, above all, access to the signals of local broadcast stations, for "even in cable homes, programming originat[ing] on local broadcast stations accounts for a combined 64% of all day viewing." Id. at ¶ 113; see S. Rep. No. 92, at 35 ("Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system.").[4]

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[3]The Commission has authority to extend its program access rules in this proceeding pursuant to sections 151, 152, 154(i), and 653(b) of the Communications Act. In addition, the Commission has specific authority to extend its rules regarding exclusive contracts under section 628(c)(2)(C) of the Communications Act. See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 10 FCC Rcd 3105, 3122-23 (1994).

[4]DBS, for instance, cannot offer access to local broadcast stations and consequently has had to focus on a "product differentiation strategy." Second Cable Competition Report at ¶¶ 58, 137. While such differentiated competition is desirable, it is not the sort of head-to-head competition with cable that is

Of all broadcast signals, the networks' are clearly the most important. With the benefits of first entry into the video delivery marketplace and access to free spectrum worth billions of dollars,[5] broadcast networks remain the dominant providers of television programming. They account for nearly 50 percent of cable television viewing, and if Fox and UPN are included, the number approaches 60 percent. National Cable Television Association, Cable Television Factbook 5 (Fall 1995); First Cable Competition Report, 9 FCC Rcd at 7452. Indeed, when the retransmission consent requirement of the 1992 Cable Act took effect, surveys indicated that up to 64 percent of cable subscribers would cancel their service if broadcast network programming were dropped. Dallas Morning News, June 21, 1993, at 1C. If network retransmission is so important that its absence would cost cable nearly two-thirds of its established subscriber base, surely an OVS programming provider that does not offer local network broadcasts will have no real chance of attracting subscribers in competition with cable.

Much the same problem exists with certain non-broadcast cable programming. Like broadcasters, cable programmers that are

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needed to break down cable operators' monopolies. See id. at ¶ 135 ("We believe current cable subscribers are more likely to switch to the services of other MVPDs in response to a price increase if those other MVPDS offer bundles of attributes comparable to the attributes offered by the cable operator.").

[5]Chairman Hundt has estimated the value of CBS's spectrum alone to be $5 billion. FCC Chairman Reed Hundt Says He Wants More Spectrum Auctions, Spectrum Flexibility, and Broadcasting Deregulation, Broadcasting & Cable, Sept. 18, 1995, at 19.

not affiliated with cable operators, or do not distribute their programming via satellite, have been treated as exempt from the Commission's program access rules. Yet cable programming can be nearly as critical to a successful multichannel programming service as network programming. The Senate Report that accompanied the 1992 Cable Act, for example, noted that the inability of MMDS operators to secure access to the "crown jewels" of cable programming precluded them from competing effectively. S. Rep. No. 92, at 14. Even the cable television industry concedes that "popular, nationally-distributed" cable services "arguably are vital to competitors that use alternative technologies." First Cable Competition Report, 9 FCC Rcd at 7531-32 (discussing NCTA comments); see also David Waterman, Vertical Integration and Program Access in the Cable Television Industry, 47 Fed. Comm. L.J. 511, 518 (1995) ("[T]here seems to be a consensus in the industry that the lack of more than one or two of the well-known networks such as ESPN, USA, CNN, and HBO, would seriously handicap a multichannel competitor to an established cable system."). The producers of this programming thus have a power over OVS programming providers that is similar to the power held by the networks.

C. Programmers' Vertical Integration and Cable Operators' Monopsony Power Cause Anticompetitive Discrimination

The major programming suppliers often have a direct incentive to use their power to disadvantage new competitors in multichannel video distribution, who may compete with the programmers' own distribution interests. In 1992, Congress recognized this problem in the specific context of cable programmers that are vertically integrated with cable operators. See 1992 Cable Act § 2(a)(5) ("Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."), reprinted in 47 U.S.C.A. § 521 note (West Supp. 1995). But Congress then had no occasion to consider the broader problem of vertical integration that now threatens the success of OVS.

In particular, the broadcast networks are effectively vertically integrated because they control not only television broadcast licenses, but also over-the-air programming and popular cable channels such as ESPN and CNBC. The networks are, moreover, positioning themselves as competitors in the multichannel video distribution market. For example, General Electric (NBC's parent corporation) is a partner in the Primestar DBS venture and owner of a SMATV provider, GE Capital-Rescom. Fox's effective parent, News Corp., is involved in satellite broadcasting around the world and has joined with MCI to set up a satellite delivery system for the United States. CBS and ABC also are affiliated with companies involved in wholesale or retail video distribution.[6]

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[6]Other large owners of broadcast television stations, such as Viacom and Cox, are cable operators, giving them a direct stake in raising other programming providers' costs and blocking successful market entry.

At the same time that these programmers are forcing new entrants to pay supra-competitive rates, cable operators are able to secure non-economic discounts. Congress has concluded that cable MSOs exercise "undue market power . . . as compared to that of . . . video programmers." 1992 Cable Act § 2(a)(2). Such "superior bargaining power," the Commission has found, allows MSOs to counterbalance the leverage that might otherwise be asserted by programmers and obtain discounts, reaching as high as 90 percent, which are not justified by cost and volume considerations.[7]

The Senate Report on the 1992 Cable Act notes that when MSOs extract exclusive discounts on programming, they gain a formidable advantage over competing multichannel video distributors. S. Rep. No. 92, at 23. The Commission likewise has recognized that discriminatory price preferences for incumbent MSOs may deter new entry by competing video distributors.[8] Indeed, MMDS operators' inability to secure the

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[7]First Cable Competition Report, 9 FCC Rcd at 7517 & n.416; see also S. Rep. No. 92, at 45 ("Even for the strongest television stations, it is clear that cable operators with market power can extract some consideration that could not be gained in an effectively competitive marketplace."); Vertical Integration and Program Access in the Cable Television Industry, 47 Fed. Comm. L.J. 511 (discussing empirical evidence that discounts programmers provide to cable operators are not justified by legitimate cost savings or economic benefits).

[8]See First Cable Competition Report, 9 FCC Rcd at 7517 ("MSOs may have used their programming purchasing power to deter the entry of new cable programmers or competitive alternatives to cable."); id. at 7527 (same); Second Cable Competition Report at ¶ 158 ("strategic vertical restraints (achieved by vertical integration, exclusive distribution contracts, or monopsony pressure) can also deter entry into the distribution market for

same sort of discounts as MSOs has been cited as a factor hindering the growth of that alternative service. Second Cable Competition Report at ¶ 82.[9]

Far from meeting cable incumbents on a level playing field, therefore, new entrants are on a see-saw: As cable operators force the rates they pay for programming down, the rates other providers pay go up.

D. Programmers Are Discriminating Against TELE-TV in the Provision of Critical Programming

TELE-TV's experience is that programmers not expressly covered by the current program access rules (either because they are not affiliated with cable operators or because they do not use satellite transmission) are pervasively engaged in just this sort of crippling discrimination. TELE-TV has had particular difficulty obtaining programming on reasonable terms from the broadcast networks and their affiliates. While TELE-TV cannot offer specific examples of broadcaster discrimination due to possible prejudice in its ongoing negotiations with broadcasters, a number of general practices deserve mention:

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delivered multichannel video programming").

[9] The anticompetitive effects of monopsony-induced discounting are recognized in the federal antitrust laws. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), makes it "unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect . . . may be substantially to lessen competition or tend to create a monopoly." The purpose behind this prohibition is precisely to preclude large purchasers from using their buying power to extort special discounts unavailable to smaller competitors, thereby driving the smaller competitors from the market. See FTC v. Henry Broch & Co., 363 U.S. 166, 174 (1960).

- Broadcasters have demanded cash per-subscriber fees not imposed on competing cable operators that carry the same programming;

- The networks have demanded that, in addition to carrying network-affiliated cable channels that cable systems carry as part of their retransmission consent agreements, TELE-TV set aside multiple additional channels for programming the networks plan to introduce in the future or that duplicates other offerings;

- Broadcasters have demanded other sorts of non-cash compensation, such as participation in vaguely defined joint ventures, as a new-entrant premium; and

- Broadcasters have refused to deal with TELE-TV in a timely fashion, thereby threatening to delay the launch of TELE-TV's new programming services.

Broadcasters have made clear in this proceeding that, absent action by the Commission, they will continue to discriminate against TELE-TV and other OVS programming providers. The National Association of Broadcasters ("NAB") and the Association of Local Television Stations ("ALTV"), for example, contend that a broadcaster should be able to force OVS programming providers to pay for its signal when the broadcaster provides the same signal to cable systems for free.[10]

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[10]The broadcasters have no answer to the point that Congress has required the Commission to extend retransmission consent rules -- which forbid discrimination of this sort between competing cable systems -- to OVS. Compare NAB Comments at 15-16 and ALTV Comments at 9 n.14 with Communications Act § 325(b)(3)(B) (retransmission consent) & 1996 Act § 653(c)(1)(B) (requiring extension of cable operators' retransmission consent obligations to OVS operators). The broadcasters' position also is directly contradicted by one of NAB's major members, NBC, which explains that "there are no public policy reasons to justify treating an OVS operator differently from a cable system operating in the same local market for purposes of broadcast signal carriage." NBC Comments at 4.

ABC and CBS similarly argue that there should be no limit on the types of "non-cash consideration," including carriage of unwanted channels, they may extract from program providers as a condition of carriage. Capital Cities/ABC Comments at 8; CBS Comments at 7. The networks even suggest that the Commission should mandate a special exemption from non-discrimination requirements that generally apply to relationships between OVS operators and programming providers, all so that the networks' power to demand OVS carriage on discriminatory terms will not be constrained. CBS Comments at 8; NBC Comments at 6.

Other providers of cable programming that are not facially subject to the Commission's program access rules have engaged in comparable discrimination, explicitly on the basis that TELE-TV is just entering the video delivery marketplace or will use new delivery technologies. These programmers have, for example,

- Sought to justify "new-entrant" or "technology" surcharges, including a so-called "OVS" surcharge; and
- Attempted to deny TELE-TV the same volume discounts offered to similarly situated cable operators.

Even cable-affiliated programmers that are subject to the Commission's program access rules have tried to maneuver around those rules. Some, for instance, have issued new rate cards that purport to exempt cable operators' contract renewals from rate increases. Others have attempted to invoke exclusive subdistribution agreements and the grandfathering provisions of the Commission's rules to delay or deny TELE-TV access to critical programming, such as regional sports programming that may be as critical to a successful programming service as prime-time network shows.

Non-compliance is not always so subtle. For example, Rainbow Programming Holdings (a cable-affiliated programmer which distributes American Movie Channel and popular regional sports channels) expressly acknowledges that it has adopted a policy of denying programming to "its potential competitors on an open video system," in direct violation of section 628 of the 1992 Cable Act and 47 C.F.R. §§ 76.1001 and 76.1002. Rainbow Comments at 5-6, 28-30.[11]

E. The Commission Should Amend Its Program Access Rules to Address this Discrimination

In the context of the Commission's annual reports on competition in multi-channel video distribution, a number of parties have urged the imposition of a non-discrimination requirement on all programming vendors. See generally Second

[11]Rainbow asks the Commission to "make clear" that its rules and section 628 do not benefit OVS programming providers. Such a "clarification" would be contrary to the plain language of the law, which benefits all "multichannel video programming distributors" equally. Rainbow's proposal would also make it impossible for OVS providers to obtain the same popular programming that is available from incumbent cable systems (such as those controlled by Rainbow's owners) -- imposing the very disability that the existing program access rules were drafted to prevent. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359, 3362 (1993); see also S. Rep. No. 92, at 28 (1992 Act's prohibition on unreasonable refusals to deal with "any multichannel video distributor" designed "[t]o encourage competition to cable").

Cable Competition Report at Appendix I (summarizing comments); First Cable Competition Report, 9 FCC Rcd at 7530-32. While the Commission promised "to monitor" programming access issues, id. at 7531, such generalized oversight plainly has not prevented discrimination by programmers against new entrants that lack the buying power of cable.

Programmers' dealings with TELE-TV, together with their clearly stated intentions to continue discriminating against OVS providers, leave no doubt that the Commissions' program access rules should address discrimination by all programmers. Such unfair practices threaten to stunt the growth of open video systems as competitors to cable. TELE-TV thus supports the recommendation of NYNEX Corporation that the Commission's program access rules, 47 C.F.R. §§ 76.1001 et seq., be amended in this proceeding. See NYNEX Comments at 20-21.

Specifically, the Commission should prohibit discrimination between OVS programming providers (or other multichannel video programming distributors) and competing cable operators in the sale or delivery of video programming, without regard to the technology used to deliver the programming to distributors.[12] This reform should take effect immediately, with no grandfathering of discriminatory contracts. New entrants into video delivery need a fair chance to compete now, not in the next

[12]Consistent with section 653(c)(1)(B), the Commission should also amend section 76.64(g) of its rules to require broadcasters to make the same election of must-carry or retransmission consent for competing multichannel video distributors. See U S WEST Comments at 20.

century when current long-term contracts expire. Should the Commission determine that additional development of the record is needed, however, TELE-TV requests that a further notice of proposed rulemaking be issued expeditiously.

II. CABLE MONOPOLISTS HAVE NO STATUTORY RIGHT TO OVS CAPACITY

In planning its programming offerings, TELE-TV is confronted with the further problem of uncertainty whether competing cable operators will have a perverse opportunity to limit TELE-TV's own offerings. This is another issue with serious and immediate practical implications that the Commission should resolve in its initial OVS rulemaking.

NCTA and other commenters argue that the Commission lacks discretion to permit OVS operators to exclude cable operators from their systems. See, e.g., NCTA Comments at 29; TCI Comments at 24-26; Cablevision/California Cable Television Association Comments at 35-37. This is clearly wrong. Section 653(a)(1) provides that "an operator of a cable system or any other person may provide video programming through an open video system," but only "[t]o the extent permitted by such regulations as the Commission may prescribe . . . ." 1996 Act § 653(a)(1) (emphasis added).

There also is nothing inconsistent between Congress's requirement that the terms of OVS carriage not be "unjustly or unreasonably discriminatory," id. § 653(b)(1)(A), and a Commission determination that cable operators should not have a guaranteed right to provide programming over OVS systems. A similar "exception" to non-discrimination rules has operated to allow cellular carriers to deny resale of their services to fully-operational, facilities-based carriers. Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 10 FCC Rcd 10666, 10696-97 (1995). Even under common law principles, common carriers were permitted to deny carriage to competitors, consistent with their non-discrimination obligation. See, e.g., Express Packing Cases, 117 U.S. 1 (1886).

Indeed, the whole purpose of encouraging the development of OVS is to provide competition among different methods for delivering video programming. In their Joint Explanatory Statement of the Committee of Conference, the congressional conferees on the 1996 Act expressed the "hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 178 (1996) ("Conference Report"). And by imposing a general prohibition on telephone companies buying cable operators and vice versa, see 1996 Act § 652, Congress intended to ensure that cable and telephone company video networks would develop separately, thereby "maximiz[ing] competition between local exchange carriers and cable operators within local markets." Conference Report at 174. Requiring OVS operators to make capacity available for cable operators would be contrary to this purpose, for it would eliminate the competition among alternative methods of delivering video programming that Congress hoped to encourage.

Cable systems indisputably remain monopolists in the multichannel video distribution market. See Second Cable Competition Report at ¶ 194; Turner Broadcasting v. FCC, 910 F. Supp. 734, 740 (D.D.C. 1995), probable juris. noted, 116 S. Ct. 907 (1996). It would be bizarre under any theory to require a new entrant, such as an OVS operator, to cede access to its facilities to an entrenched provider that already has a network in place. Even requiring the incumbent monopolist to assist its competitors in this fashion has been called "the antithesis of competition." Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 378 (7th Cir. 1986). That logic applies even more powerfully where the monopolist seeks a helping hand from a new entrant.

The Commission has recognized in other contexts that competition is enhanced when carriers are required to compete on a facilities basis rather than through resale. In its CMRS Interconnection proceeding, for example, the Commission considered, among other issues, whether there are any conditions under which CMRS providers should be allowed to restrict resale of their services. The Commission proposed adhering to its previous finding that CMRS providers' obligation to allow resale of their services on non-discriminatory terms should not require unlimited resale to an operational facilities-based competitor, because permitting CMRS providers to deny each other resale "would promote competition by encouraging each licensee to build out its network." Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 10 FCC Rcd at 10696-97, 10709-10. Precisely the same reasoning applies here, where cable operators are fully operational (in fact, dominant), facilities-based competitors to the new OVS entrants.

In addition to these general competitive considerations, a rule granting mandatory OVS access to cable operators would create a mechanism through which cable operators could effectively sabotage their competitors. Section 653(b)(1)(B)'s requirement that limits an OVS operator to 1/3 of the system's capacity when demand for channel capacity exceeds supply may give cable monopolists an incentive to demand access simply to interfere with the program offerings of the OVS operator's programming affiliate. For example, if a 100-channel OVS system has 99 occupied channels, of which 50 are used by an affiliate of the OVS operator, the competing cable system might demand access just so that the affiliated programming provider will be forced to drop channels from its offerings, thereby making its programming packages less attractive to consumers and less competitive with cable. It makes no sense to mandate such a mechanism through which a cable monopolist could limit the commercial attractiveness of OVS by clogging a competing OVS system with "infomercials" or the like.

Not only would mandatory access for cable operators reduce competition, but it could also reduce the quality and variety of programming available to consumers. One purpose of the First Amendment is "to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (emphasis added) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)); see Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1597 (1995) (Stevens, J., concurring) ("more speech and a better-informed citizenry are among the central goals of the Free Speech Clause"). Yet if cable operators were guaranteed the right to occupy OVS capacity in addition to their own systems, other programming providers who do not have access to an alternative video network may be excluded. Consumers would have fewer viewpoints from which to select, all contrary to the public interest in a robust and diverse video marketplace.

III. SECTION 653(b)'s NONDISCRIMINATION REQUIREMENTS DO NOT LIMIT THE COMPETITIVE PROVISION OF NAVIGATIONAL DEVICES BY PROGRAMMING PROVIDERS

Finally, ALTV has argued that both OVS operators and OVS programming providers must allow access to broadcast television signals on every menu they present to subscribers. ALTV Comments at 7-9. In asking the Commission to extend section 653(b)(1)'s nondiscrimination requirement to menus and other navigational devices presented by OVS programming providers, ALTV flatly misreads the Act.

Subsection 653(b) lays out a detailed framework governing relations between OVS operators and programming providers. It requires the Commission to promulgate regulations governing discrimination by OVS operators among programming providers, § 653(b)(1)(A), and prohibiting "unreasonabl[e] discriminat[ion] in favor of the operator or its affiliates with regard to the material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers." § 653(b)(1)(E)(i). In addition, the Commission is required to issue regulations that "prohibit an operator of an open video system from omitting television broadcast stations or other unaffiliated programming services carried on such system from any navigational device, guide or menu." § 653(b)(1)(E)(iv).

These requirements address OVS operators' ability to favor affiliated programming providers. But section 653(b) goes no further. In particular, it does not govern the provision of a "navigational device, guide or menu" by any distributor of programming that takes space on an open video system, whether that programming provider is affiliated with the OVS operator or not. The Commission implicitly recognized this limitation in its NPRM. See NPRM at ¶ 49 (provisionally concluding that section 653(b) prohibits "an open video system operator" from discriminating "in the way it markets affiliates' programming or interfaces with the customer in describing program selection"). This limitation on the scope of section 653(b) also has been accepted by a wide range of commenters in this proceeding,